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For participants only

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Provisional summary record of the 3441st meeting
Held at the Palais des Nations, Geneva, on Thursday, 2 August 2018, at 10 a.m.

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Present:

Chair:	Mr. Valencia-Ospina
Members:	Mr. Argüello Gómez
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Mr. Wako
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10 a.m.

Draft report of the Commission on the work of its seventieth session (*continued*)

Chapter VII. Provisional application of treaties (*continued*) (A/CN.4/L.920 and Add.1)

The Chair invited the Commission to resume its consideration of the portion of chapter VII of the draft report contained in document A/CN.4/L.920/Add.1.

Commentary to draft guideline 9 (Termination and suspension of provisional application)

Paragraph (1)

Sir Michael Wood said that, as paragraph 1 of the draft guideline referred to the entry into force of the treaty in the relations between the States or international organizations concerned, it would perhaps be more accurate in the second sentence of paragraph (1) of the commentary to replace the phrase "when the treaty enters into force for the State or international organization concerned" with "when the treaty enters into force between the States or international organizations concerned". The question was not the overall entry into force of the treaty, but rather whether it had entered into force between two States or international organizations.

Mr. Gómez-Robledo (Special Rapporteur) said that, to him, it seemed that the word "for" might allow for a broader interpretation, covering both the entry into force as such and the entry into force for the State.

Mr. Nolte said that his sense was that the word "for" might indeed be more appropriate, as a situation could arise whereby a treaty entered into force provisionally for one State that was then obliged to follow through *vis-à-vis* others that had agreed that the treaty could enter into force under certain conditions that might not yet have been fulfilled for the other States. He would therefore propose retaining the original wording.

Paragraph (1) was adopted.

Paragraph (2)

Paragraph (2) was adopted.

Paragraph (3)

Mr. Nolte proposed deleting the word "subjective" in the first sentence. He understood that the Special Rapporteur was referring to the entry into force for that particular State, but that was an objective fact and not something subjective.

Mr. Rajput said that it would be preferable to dispense with the distinction between "objective" and "subjective" entry into force. One solution might be to replace the latter part of the first sentence with the end of the final sentence, to read: "The phrase 'in the relations between the States or international organizations concerned' was included to capture all the possible legal situations that may exist with regard to entry into force under treaties of different types." The second sentence would remain as originally drafted.

Mr. Gómez-Robledo (Special Rapporteur) said that he saw the merit in removing words such as "objective" and "subjective", which might not be sufficiently precise, although their meaning was clear. Concerning Mr. Rajput's proposal, as he recalled, part of the discussion on the phrase "in the relations between the States or international organizations concerned" had centred on "objective" and "subjective" entry into force and not on different types of treaties. A reference to "treaties of different types" might be understood as meaning treaties on different subjects, and would introduce an extraneous issue to the paragraph.

Mr. Rajput said that the reason he had proposed referring to "treaties of different types" was to preface and clarify what was said in the second sentence concerning the phrase "viewed as being particularly relevant in the relations between parties to a

multilateral treaty". As he recalled, the intention had been to capture a broad set of situations by using the words "in the relations between".

Mr. Nolte said that, in order to address the concerns of both Mr. Rajput and the Special Rapporteur, perhaps the second half of the first sentence could be amended to read "was included to distinguish the entry into force of the treaty from the provisional application of the treaty by one or more parties to the treaty", which would make it clear that such a distinction was being made, as explained in the next sentence.

Mr. Gómez-Robledo (Special Rapporteur) said that he would support the proposal made by Mr. Nolte.

Paragraph (3), as amended, was adopted, subject to a minor editorial change.

Paragraph (4)

Paragraph (4) was adopted.

Paragraph (5)

Mr. Nolte said that the middle part of the third sentence — "it was not clear to the Commission that contemporary practice continued to support the narrow language of the Vienna Conventions" — was inappropriate. He therefore proposed amending it to read: "Given the complexity of concluding modern multilateral treaties, all negotiating States or international organizations were to be treated as being on the same legal footing in relation to provisional application and that the existence of other groups ...".

Mr. Gómez-Robledo (Special Rapporteur) said that, although he had no objection to Mr. Nolte's proposal, he wished to share a similar proposal put forward by Mr. Murphy, who did not believe it was appropriate for the Commission to be seen to cast doubt on the text of the Vienna Conventions on the law of treaties. Mr. Murphy had proposed amending the third sentence to read: "Given the complexity of concluding modern multilateral treaties, contemporary practice supports a broad reading of the language of the Vienna Conventions in terms of treating all negotiating States or international organizations as being on the same legal footing …".

Mr. Nolte said that he had no objection to adopting the proposal by Mr. Murphy.

Paragraph (5), as amended, was adopted.

Paragraphs (6) and (7)

Paragraphs (6) and (7) were adopted.

Paragraph (8)

Mr. Nolte said that he wished to convey a proposal put forward by Mr. Murphy, which he supported. In Mr. Murphy's view, the words "in the case of a material breach" in the second sentence should be deleted, as they unnecessarily restricted what was said in that sentence to the issue of a material breach, whereas other grounds for terminating a treaty should not be excluded.

Mr. Rajput said that he agreed with Mr. Murphy's proposal. In addition, in the fourth sentence, the introductory phrase, "Another conceivable scenario is that in which a State or international organization …", did not make it clear what specifically was being discussed. He therefore proposed replacing the words "in which" with "in situations of material breach" to add clarity.

The Chair said he took it that the Commission wished to adopt the proposals put forward by Mr. Rajput and by Mr. Nolte on behalf of Mr. Murphy.

It was so decided.

Paragraph (8), as amended, was adopted.

Paragraph (9)

Mr. Murphy said that, in the first sentence, the words "not only article 60 but also other" should be deleted before "provisions pertaining to termination and suspension".

Paragraph (9), as amended, was adopted.

Paragraph 10

Mr. Rajput said that, as the statement made in the second sentence in relation to the 1986 Vienna Convention not yet having entered into force could have normative implications, the words "should not be referred to in the same manner as its 1969 counterpart" could be replaced with "may not be referred to in the same manner" to avoid expressing doubt about the Convention as a whole.

Mr. Murphy said that Mr. Rajput's proposal would change the meaning somewhat, perhaps unfavourably. Given that the language of the first two sentences had been borrowed and added to paragraph (2) of the commentary to draft guideline 2, if it was changed in the current paragraph it would be necessary to also review it in that paragraph. In his view, the easiest solution might be to delete the second sentence entirely, as the same point had already been made earlier in the commentary. The first and third sentences could then be connected by inserting a comma after "international organizations" followed by the word "but".

Mr. Gómez-Robledo (Special Rapporteur) said that he did not wish to reopen the issue, which had already provoked debate in the Drafting Committee and the Sixth Committee. The European Union had taken a strong stance in favour of qualifying the reference to the 1986 Vienna Convention, and former Commission member Mr. Forteau had also held strong views on the matter. He therefore believed that Mr. Murphy's proposal might resolve the issue.

Mr. Saboia said that he would also support deleting the sentence. Although he had not participated in the discussion on the issue in the Drafting Committee, he considered the proposed formulation inappropriate. Although their binding nature differed, conventions that had been adopted but that had not yet entered into force should not be seen as less important than others.

The Chair said he took it that the Commission wished to adopt the amendment put forward by Mr. Murphy.

It was so decided.

Paragraph (10), as amended, was adopted.

Paragraph (11)

Mr. Nolte proposed deleting the second sentence, as it was unnecessary and somewhat misleading, particularly in the light of the Commission's debate and decision on the topic of *jus cogens*, in which it had taken note of a decision of the International Court of Justice finding that certain procedural provisions in section 4 of the 1969 Vienna Convention on the Law of Treaties were customary international law and as such might be applicable to all States. In the last sentence, he proposed replacing the words "the Commission considered invalidity in" with "the Guide addresses invalidity in".

Mr. Gómez-Robledo (Special Rapporteur) said that the paragraph had been drafted prior to the Commission's discussion on the topic of *jus cogens*. Although a number of members had expressed strong views in the Drafting Committee concerning the non-applicability of the procedural provisions contained in section 4 to States that were not parties to the 1969 Vienna Convention, in the light of Mr. Nolte's explanation and the reference to the ruling of the International Court of Justice, he was not opposed to deleting the second sentence.

Paragraph (11), as amended, was adopted.

The commentary to draft guideline 9 as a whole, as amended, was adopted.

Commentary to draft guideline 10 (Internal law of States and rules of international organizations, and the observance of provisionally applied treaties)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

Mr. Rajput said that he would be interested to know the standard wording used by the Commission when it wished to indicate that certain provisions were to be read in the light of other provisions. As currently drafted, the paragraph indicated that the provision "should be considered together with" article 27 of the 1969 and 1986 Vienna Conventions, which gave the impression that a correlation was being drawn between the paragraph and the article. Perhaps it would be more appropriate to say that it should be "considered in the light of" those articles.

Mr. Cómez-Robledo (Special Rapporteur) said that there was a substantive difference between the formulations "considered together with" and "considered in the light of". From the outset of the project, it had been clear that the primary rules that would shed light on a given provision were the relevant articles of the 1969 and 1986 Vienna Conventions and other applicable rules of international law. In Spanish, he would use the formulation "*tienen que verse en conjunción*" or "*tienen que verse de manera corjunta*".

The Chair said that, as the Special Rapporteur's preferred formulation in Spanish seemed to have been adequately translated as "should be considered together with" in English, if he saw no objection he would take it that the Commission wished to adopt the paragraph as originally drafted.

Paragraph (2) was adopted.

Paragraph (3)

Mr. Nolte said that he had circulated a proposal in writing concerning the second sentence of paragraph (3), which, as it stood, read: "... draft guideline 10 states that the provisional application of a treaty by a State or international organization cannot, as a general rule, depend on, or be conditioned by, their internal laws or rules." In his view, that sentence was incorrect in a formal sense because the draft guideline did not state that. It was also misleading in a substantive sense because the words "conditioned by" suggested that provisional application could not be limited by internal law, but draft guideline 12 provided for precisely that. The second sentence should more closely track the language of article 27 of the Vienna Conventions and draft guideline 10 and should avoid giving the mistaken impression that parties to a treaty were in any way restricted from agreeing on a limitation of provisional application by their internal law. He proposed that the first sentence should remain unchanged and the second sentence should be amended to read: "Like article 27, draft guideline 10 states, as a general rule, that a State or an international organization may not invoke the provisions of its internal law or rules as justification for its failure to perform an obligation arising under such provisional application." If that modification was accepted, the third sentence could be deleted and the remainder of the paragraph kept as originally drafted. He was concerned about the use of selective quotations from the Guide and believed the Commission should take a cautious approach by quoting the draft guidelines as they were written.

Mr. Gómez-Robledo (Special Rapporteur) said that, as originally drafted, paragraph (3) could never be read in isolation from the rest of the draft guidelines and commentaries. Draft guideline 10 was part of a broader project and, in his view, could not be said to contradict draft guideline 12. However, as draft guideline 10 was perhaps one of the most important provisions of the project, he would be willing to accept Mr. Nolte's proposals if members considered it more appropriate.

The Chair said he took it that the Commission wished to adopt the proposal put forward by Mr. Nolte.

It was so decided.

Paragraph (3), as amended, was adopted.

Paragraphs (4) to (6)

Paragraphs (4) to (6) were adopted.

Paragraph (7)

Mr. Murphy proposed that in the second sentence of paragraph (7), the words "the same legal effect" should be replaced with "a legally binding obligation to apply the treaty or a part thereof", in order to align it with draft guideline 6.

Paragraph 7, as amended, was adopted.

The commentary to draft guideline 10 as a whole, as amended, was adopted.

Commentary to draft guideline 11 (Provisions of internal law of States and rules of international organizations regarding competence to agree on the provisional application of treaties)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

Mr. Nolte proposed that the beginning of paragraph (3) should be amended to read "Draft guideline 11 provides that", instead of "Draft guideline 11 states that".

Paragraph 3, as amended, was adopted.

Paragraph (4)

Paragraph (4) was adopted.

The commentary to draft guideline 11 as a whole, as amended, was adopted.

Commentary to draft guideline 12 (Agreement to provisional application with limitations deriving from internal law of States and rules of international organizations)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

Mr. Nolte said that in the first sentence of paragraph (2), the words "such as obtaining parliamentary consent" should be deleted. The Special Rapporteur had suggested the insertion of an example of limitations to which States might agree with regard to their internal law; however, the sentence gave the impression that obtaining parliamentary consent was a typical example of such limitations, which was not the case. Parliamentary consent was usually a requirement for the final entry into force of a treaty, whereas the usual function of clauses limiting provisional application to domestic law was to refer to particular provisions of internal law that could not be changed immediately and that States therefore agreed should be respected.

In the second sentence, the words "or even" between "rules of the international organization" and "make such provisional application conditional" should be replaced with "and".

With regard to footnote 57, he was unsure whether it was correct to say that the Free Trade Agreements cited contained clauses in which provisional application was made conditional on the non-violation of the internal law of the State. The footnote contained as an example a clause which stated that provisional application was undertaken if constitutional requirements permitted, rather than referring to limitations in substance to the

scope of internal law. It would be helpful if the Secretariat could verify whether the examples given in footnote 57 did indeed relate to the case addressed in draft guideline 12.

Mr. Gómez-Robledo (Special Rapporteur) said that, with regard to the first sentence of paragraph (2), while he agreed that it should not be implied that obtaining parliamentary consent was a typical example and that it could be useful to include additional examples, it would be more appropriate to explain those considerations in footnotes. He would address Mr. Nolte's concern in that regard in a revised proposal to be presented on second reading. In the interim, the words "such as obtaining parliamentary consent" would be deleted.

With regard to footnote 57, while his own interpretation was different from Mr. Nolte's, it could be helpful for the Secretariat to verify the examples given, on the understanding that Mr. Nolte would be consulted on that point before any changes were made.

The Chair said that, with regard to footnote 57, he took it that the Commission agreed that the Secretariat should verify the examples and that the matter would not be brought back to plenary unless errors were found. Paragraph (2) could therefore be adopted on that understanding.

It was so decided.

Paragraph (2), as amended, was adopted on that understanding.

Paragraphs (3) and (4)

Paragraphs (3) and (4) were adopted.

Paragraph (5)

Sir Michael Wood said that paragraph (5) seemed an odd paragraph to include, particularly as the final paragraph of the commentaries. It appeared to constitute almost a policy statement to the effect that guideline 12 should not be taken as intending to encourage States to include limitations. It was not for the Commission to take a position on whether States should or should not include such limitations in their treaties; States were free to draft treaties as they saw fit.

Mr. Nolte said that he shared Sir Michael Wood's concern. Although inserting the words "or discouraging" after "encouraging" could perhaps address that concern, he was of the opinion that paragraph (5) should be deleted.

Mr. Saboia and **Mr. Ruda Santolaria** supported the deletion of paragraph (5).

Mr. Gómez-Robledo (Special Rapporteur) said that while he agreed that paragraph (5) would be awkward as the final paragraph of the commentaries, it was possible that more draft guidelines might be added at a later time. In including the paragraph, his intention had been to reflect the debate that had taken place.

The Chair said he took it that Commission members wished to delete paragraph (5).

It was so decided.

The commentary to draft guideline 12 as a whole, as amended, was adopted.

The commentaries to the draft guidelines on provisional application of treaties, as a whole, as amended, were adopted.

Chapter VII of the draft report as a whole, as amended, was adopted.

Mr. Argüello Gómez said that he wished to place on record that, in his opinion, from a legal perspective it was not logical that a provisionally applied treaty should be accorded the same protection against internal law as a treaty that had been duly ratified. It was important that the draft guidelines should reflect the fact that at least one member was not entirely satisfied with the position set out therein with regard to the effect of internal law.

The Chair said that the position of Mr. Argüello Gómez had been noted and would be taken into account on second reading.

Chapter V. Identification of customary international law (A/CN.4/L.918 and A/CN.4/L.918/Add.1)

The Chair invited the Commission to consider the portion of chapter V of its draft report contained in document A/CN.4/L.918.

A. Introduction

Paragraph 1

Mr. Murphy said that in footnote 1 to paragraph 1, the words "At its" at the beginning of the first sentence should be replaced with "See". With regard to the second sentence, it was likely that the Commission had not had a note before it at the meeting on 22 May 2012. In addition, the chronology laid out in the third and fourth sentences was somewhat confusing.

Sir Michael Wood (Special Rapporteur) said that the second sentence of footnote 1 could be deleted.

Paragraph 1, as amended, was adopted.

Paragraphs 2 and 3

Paragraphs 2 and 3 were adopted.

B. Consideration of the topic at the present session

Paragraphs 4 to 7

Paragraphs 4 to 7 were adopted.

Paragraphs 8 and 9

Paragraphs 8 and 9 were adopted, subject to their completion by the Secretariat.

Paragraph 10

Paragraph 10 was adopted.

C. Recommendation of the Commission

Paragraph 11

Paragraph 11 was left in abeyance.

D. Tribute to the Special Rapporteur

Paragraph 12

Paragraph 12 was left in abeyance.

E. Text of the draft conclusions on identification of customary international law

1. Text of the draft conclusions

Paragraph 13

Paragraph 13 was adopted.

The Chair invited the Commission to consider the portion of chapter V contained in document A/CN.4/L.918/Add.1.

E. Text of the draft conclusions on identification of customary international law

2. Text of the draft conclusions and commentaries thereto

Paragraph 1

Paragraph 1 was adopted.

Identification of customary international law

General commentary

Paragraphs (1) and (2)

Sir Michael Wood (Special Rapporteur) proposed that the order of paragraphs (1) and (2) should be reversed so that paragraph (1) would mirror paragraph (1) of the general commentary to the Guide to Provisional Application of Treaties, as adopted by the Commission.

Paragraphs (1) and (2) were adopted on that understanding.

Paragraph (3)

Mr. Park said that since the term "*opinio juris*" appeared for the first time in the document in paragraph (3), footnote 7 should be moved to that paragraph from its current location in paragraph (1) of the commentary to draft conclusion 2.

Mr. Nolte said that in the second sentence, the words "and can be an effective means for subjects of international law to regulate their behaviour" should be deleted, since they could give rise to the misunderstanding that customary international law could also be an ineffective means.

Mr. Murphy said that if Mr. Nolte's proposal was taken up, it would be preferable to combine the first and second sentences into one, so as to avoid having two short sentences.

Mr. Nolte said that he liked short sentences if they conveyed clear messages, as was the case in that instance.

Sir Michael Wood (Special Rapporteur) said that, in his opinion, it was preferable to retain the two short sentences, including the word "remains", which emphasized the continuing importance of customary international law.

The Chair said he took it that the Commission wished to take up Mr. Park's proposal and Mr. Nolte's proposal to delete words in the second sentence. The first and second sentences of the paragraph would not be combined into one.

It was so decided.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Paragraph (4) was adopted.

Paragraph (5)

Mr. Park said that, in the last sentence of paragraph (5), the word "rule" should be deleted after the words "persistent objector". The word "rule" had not been mentioned in that context during the discussions of the Working Group on identification of customary international law earlier in the current session. If the Special Rapporteur's intention in that sentence had been to reflect the titles of draft conclusions 15 and 16, then the deletion was necessary.

Mr. Vázquez-Bermúdez said that he supported Mr. Park's proposal. In addition, the word "usually" should also be deleted from the sixth sentence, since the idea being

expressed was that two specific cases constituted exceptions to the binding nature of customary international law. The word "usually" might therefore create problems of interpretation.

Mr. Murphy said that the term "persistent objector rule" also appeared in paragraph (4) of the commentary to draft conclusion 15. Furthermore, paragraph (1) of the commentary to draft conclusion 15 stated that the concept was "sometimes referred to as the persistent objector 'rule' or 'doctrine'". On that basis, if Mr. Park was proposing that the word "rule" be deleted in every instance in the document where it occurred after "persistent objector", he himself would persistently object to that proposal.

Ms. Oral said that she would not be comfortable with making the change proposed by Mr. Park systematically throughout the document.

Mr. Park said that he objected to the use of the word "rule" in paragraph (5) only, since the Special Rapporteur had changed his position after the Working Group's discussions.

Sir Michael Wood (Special Rapporteur) said that he accepted Mr. Park's proposal. While he did not object to the deletion of the word "usually", it was important to make clear in the text that customary international law was universally binding with the exception of the questions addressed in Part Six and Part Seven of the draft conclusions.

In addition, in the part of the sixth sentence that appeared within brackets, the words "of customary international law" should be inserted after the word "rules".

Paragraph (5), as amended, was adopted.

The general commentary to the draft conclusions on identification of customary international law, as a whole, as amended, was adopted.

Part One (Introduction)

The chapeau of Part One was adopted.

Commentary to draft conclusion 1 (Scope)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

Mr. Vázquez-Bermúdez proposed that the last sentence in footnote 5 should be deleted, in the light of the statement, in paragraph (6) of the commentary to draft conclusion 1, that no attempt was made to explain the relationship between customary international law and other sources of international law listed in Article 38 (1) of the Statute of the International Court of Justice.

Paragraph (3) was adopted, with an amendment to footnote 5.

Paragraph (4)

Paragraph (4) was adopted.

Paragraph (5)

Paragraph (5) was adopted with a minor editorial change.

Paragraph (6)

Mr. Nolte said that in order to make clearer that the last sentence in paragraph (6) dealt with two distinct issues — customary international law within national legal systems and the burden of proof — he proposed splitting it into two. The new penultimate sentence would begin with the word "Fourth", rather than "Finally", and end after the words "national legal systems", and the new last sentence would read: "Finally, the draft

conclusions do not deal with the general question of a possible burden of proof of customary international law."

Sir Michael Wood (Special Rapporteur) said that he was in agreement with the proposal made by Mr. Nolte, except that instead of the phrase "do not deal with the general question of a possible burden of proof", he would prefer "do not deal in general terms with the question of a possible burden of proof".

Paragraph (6), as amended, was adopted.

The commentary to draft conclusion 1 as a whole, as amended, was adopted.

Part Two (Basic approach)

The chapeau of Part Two was adopted.

Commentary to draft conclusion 2 (Two constituent elements)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

Paragraph (2) was adopted with a minor editorial change.

Paragraph (3)

Mr. Tladi noting that the Commission's practice was to refer not to the "Colombian/Peruvian asylum case", but simply the "*Asylum case*", in line with the official citation given by the International Court of Justice in its Judgment, said that the reference should be corrected throughout the report.

Mr. Petrič said that the Commission would perhaps need to discuss what practice it wished to adopt with regard to the citation of cases. The practice of the International Court of Justice itself had changed over time; now the official citation given by the Court necessarily included the title of the case.

Sir Michael Wood (Special Rapporteur) said that, to date, only one "*Asylum case*" had been adjudicated in the International Court of Justice; therefore, he would not be opposed to retaining the official citation with "*Asylum case*" after the first time it appeared in the report. In fact it was better to do what the Court itself did.

The Chair suggested entrusting the Secretariat with making any necessary amendments to the citation of the case.

Paragraph (3) was adopted on that understanding.

Paragraphs (4) and (5)

Paragraphs (4) and (5) were adopted.

Paragraph (6)

Mr. Tladi proposed deleting the second part of the second sentence of the paragraph, beginning with the words "and is not divided", as he was not certain its content was correct.

Sir Michael Wood (Special Rapporteur) said that given that the first sentence of the paragraph was the most important one, he would be willing to accept Mr. Tladi's proposal.

Mr. Nolte said that he could have supported Mr. Tladi's proposal had the second sentence originally ended after the words "and is not divided into separate branches"; however, the phrase that followed — "each with its own approach to sources" — was an integral part of the point being made by the Special Rapporteur. It did not mean that there were not different branches of international law, but rather that there were not different sources for each branch, a statement with which he agreed.

Mr. Tladi said that the interpretation put forward by Mr. Nolte, which was one reading of the second sentence, was already reflected elsewhere in the report; for that reason and because the sentence could be misleading for some readers, he would still prefer to delete the second part thereof.

Mr. Nolte said that a solution that took into account the concern expressed by Mr. Tladi might be to rephrase the second part of the sentence so that it read "and is not divided into separate branches with their own approach to sources", to make clear that the different branches of international law did not have their own approach to sources.

Mr. Murphy said that he supported the proposal made by Mr. Nolte.

Paragraph 6, as amended by Mr. Nolte, was adopted.

The commentary to draft conclusion 2 as a whole, as amended, was adopted.

Commentary to draft conclusion 3 (Assessment of evidence for the two constituent elements)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

Sir Michael Wood (Special Rapporteur) suggested that reference should be made to the recent judgment of the United Kingdom Court of Appeal in *Freedom and Justice Party v. Secretary of State for Foreign and Commonwealth Affairs*, and that footnote 19 seemed the most appropriate place for such a citation.

The Chair suggested that the Secretariat should be entrusted with making the necessary amendment to footnote 19.

Paragraph (2) was adopted on that understanding.

Paragraph (3)

Paragraph (3) was adopted.

Paragraph (4)

Mr. Tladi proposed deleting the second sentence of the paragraph, as he was not certain that it was accurate. For example, in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, which had related precisely to the prohibition of torture, the International Court of Justice had sought to identify affirmative State practice.

Mr. Nolte proposed that, in the second sentence, the word "deliberate" should be deleted, as its use in defining "inaction" here was inappropriate. It was very difficult to prove that States deliberately did not take action; it should be sufficient to require that States were conscious of their inaction. The issue, moreover, was not one that should be dealt with in the current paragraph, since, as pointed out in footnote 22, it would be explained further in paragraph (3) of the commentary to draft conclusion 6. He therefore proposed that it was sufficient to refer simply to "inaction" and to point out where the term would be explained further. He reserved his position as to the use of the word "deliberate" in the commentary to draft conclusion 6. Moreover, he did not support the proposal by Mr. Tladi, because the phrase in parentheses was very important: it was the difference between prohibitive rules and other rules. The attention of those that applied customary international law should be drawn to that distinction by that very formulation.

Mr. Murphy, agreeing with Mr. Nolte that the second sentence was too important to delete, said that in his view that sentence highlighted that the nature of the rule was significant when looking for evidence. One of the most important areas where the nature of the rule might well dictate whether there was action or inaction was a prohibitive rule, as in

the prohibition of torture. Therefore, it was useful to highlight it for those trying to assess whether they had evidence that allowed for the identification of an existing rule.

He did not agree with Mr. Nolte that the word "deliberate" should be deleted; as he recalled, during its debate on the draft conclusions themselves, the Commission had agreed that it was an important aspect of the concept of inaction. Member States had expressed concern that mere inaction might be deemed as tantamount to action and had stressed that it should be made clear that it was inaction on the basis of a deliberate process by the State. The Commission had also decided that while it would not include the word "deliberate" in the draft conclusions themselves, it could do so in the commentary thereto. Therefore, he would prefer to retain the word "deliberate" in paragraph (4), although he would not be opposed to deleting the text "(for example, the prohibition of torture)".

Mr. Tladi said that, if the second sentence was retained, it would be helpful for it to be explained, particularly in the light of the example that was given therein, namely the prohibition of torture. In *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, the International Court of Justice had been able to find affirmative State practice concerning a prohibitive rule. The distinction that was drawn in the sentence appeared to be based on an understanding of conduct as being limited to conduct "on the ground". Yet, in draft conclusion 6, the definition of conduct was broad and included legislation and case law, among other things. Consequently, he was concerned that the sentence was inaccurate and, while he would not stand in the way of its retention, he would prefer to see it clarified further.

Mr. Hmoud said that he agreed with the proposal to delete the word "deliberate", which created confusion between inaction as mandated by law and inaction as conduct.

Mr. Grossman Guiloff said that he also agreed with the proposal to delete the word "deliberate". In the case of torture, it was not at all difficult to find affirmative State practice. It would thus be advisable to remove the reference to the prohibition of torture in the second sentence.

Mr. Park said that he, too, agreed with the proposal to delete the word "deliberate", which the Commission had, in the first part of the session, discussed in relation to the text of draft conclusion 6, before ultimately deciding not to include it there.

Mr. Murphy asked whether those members who supported the deletion of the word "deliberate" would also seek to remove any trace of it from paragraph (3) of the commentary to draft conclusion 6, in which the Commission was trying to explain what type of inaction was probative.

Mr. Nolte said that the reference to the prohibition of torture was perhaps unnecessary and could be omitted. Regarding the possible deletion of the word "deliberate" in paragraph (3) of the commentary to draft conclusion 6, the Commission should adopt a paragraph-by-paragraph approach. It would, at some point, need to explain what "inaction" meant, and the distinction between "deliberate" and "conscious".

Mr. Tladi said that his issue with the second sentence was not the reference to the prohibition of torture, but that the sentence as a whole was inaccurate, as it failed to take into account the wide variety of forms of conduct that existed. While, with conduct "on the ground", it was clearly more difficult to find much affirmative State practice, that was not the case with other forms of conduct, even where prohibitive rules were concerned. It was disappointing that the Commission did not seem minded to clarify the sentence.

Mr. Nolte said that one way of addressing Mr. Tladi's concern might be to insert the word "sometimes" after "it may".

Sir Michael Wood (Special Rapporteur) said that, taking into account all the comments and proposals from members, the second sentence should be redrafted to read: "In particular, where prohibitive rules are concerned, it may sometimes be difficult to find much affirmative State practice (as opposed to inaction); cases involving such rules are more likely to turn on evaluating whether the inaction is accepted as law."

The Chair said that the deletion of the word "deliberate" did not necessarily mean that the word would be removed from later paragraphs of the commentary.

Paragraph (4), as amended, was adopted.

Paragraphs (5) and (6)

Paragraphs (5) and (6) were adopted.

Paragraph (7)

Mr. Vázquez-Bermúdez said that, in the first sentence, the words "*opinio juris*" should be inserted, in parentheses, after "acceptance as law".

Paragraph (7), as amended, was adopted.

Paragraphs (8) and (9)

Paragraphs (8) and (9) were adopted.

The commentary to draft conclusion 3 as a whole, as amended, was adopted.

Part Three (A general practice)

The chapeau of Part Three was adopted.

Draft conclusion 4 (Requirement of practice)

Mr. Murphy said that, in the first paragraph of the draft conclusion, the word "to" was missing after "primarily".

The Chair said that the Secretariat would make that editorial correction.

Commentary to draft conclusion 4 (Requirement of practice)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

Mr. Nolte asked why a reference to the Commission's work on the topic "Subsequent agreements and subsequent practice in relation to interpretation of treaties" had been removed from footnote 27.

Sir Michael Wood (Special Rapporteur) said that he saw no need to go into too much detail in a footnote whose purpose was simply to make clear that State practice was relevant in other contexts.

Paragraph (2) was adopted.

Paragraph (3)

Mr. Nolte said that, to avoid implicitly downgrading the content of draft conclusion 4, the second sentence should track more closely the language of paragraph 2 thereof. He therefore proposed that the words "may be relevant in this context" should be replaced with "contributes to the formation, or expression, of rules of customary international law".

Mr. Hmoud said that, to be completely faithful to the language of paragraph 2, the words "in certain cases", set off in commas, should be included before the word "contributes".

Paragraph (3), as amended, was adopted.

Paragraph (4)

Mr. Park said that, in footnote 29, no source was provided for the definition of the term "international organizations". He asked what that source was and recalled that, in the first part of the session, he had proposed that the Commission should draw on article 2 (a) of its 2011 articles on the responsibility of international organizations.

Sir Michael Wood (Special Rapporteur) said that the definition had been drafted by members of the Commission during its consideration of the topic. The purpose of the footnote was to warn non-experts that reference was being made to public or intergovernmental international organizations, and not to non-governmental organizations.

Paragraph (4) was adopted.

Paragraph (5)

Paragraph (5) was adopted.

Paragraph (6)

Mr. Vázquez-Bermúdez said that, as it stood, the last sentence limited the role or contribution of international organizations. He therefore proposed replacing the words "when serving as treaty depositaries" with "when concluding treaties, serving as treaty depositaries".

Paragraph (6), as amended, was adopted.

Paragraph (7)

Paragraph (7) was adopted.

Paragraph (8)

Sir Michael Wood (Special Rapporteur) proposed that, for the sake of clarity, in the first sentence, the word "NGOs" should be inserted, in parentheses, after "non-governmental organizations".

Mr. Murphy said that footnote 34 contained a reference to the Commission's work on the topic "Subsequent agreements and subsequent practice in relation to interpretation of treaties". The Secretariat should ensure uniformity in the manner in which such references were handled in the footnotes.

Paragraph (8), as amended, was adopted on that understanding.

Paragraph (9)

Sir Michael Wood (Special Rapporteur) proposed that, in footnote 36, the words "1949 Geneva Conventions for the protection of war victims" should be replaced with "Geneva Conventions for the protection of war victims of 12 August 1949". The aim was to make clear that the words "for the protection of war victims" were part of the generic title often used to refer to the four Geneva Conventions, rather than somehow limiting the role of the International Committee of the Red Cross (ICRC).

Mr. Saboia asked why, in footnote 36, reference was made only to the 1949 Geneva Conventions and not, for example, to the protocols additional thereto, which also assigned functions to ICRC, and whether the mention of "war victims" was sufficient to cover civilians and other categories of protected persons.

Sir Michael Wood (Special Rapporteur) said that the title containing a mention of war victims was the designation used by ICRC on its website to refer to all four of the Geneva Conventions. On the question of specific functions, in 2016, he had discussed the footnote with representatives of ICRC, who were content with the wording chosen.

Paragraph (9), as amended, was adopted.

The commentary to draft conclusion 4 as a whole, as amended, was adopted.

Commentary to draft conclusion 5 (Conduct of the State as State practice)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

Paragraph (5)

Mr. Murphy said that he would prefer to redraft footnote 39 to read: "In the case of particular customary international law, the practice must be known to at least one other State or a group of States (see draft conclusion 16, below)."

Mr. Park proposed the insertion of the word "concerned", which was used in draft conclusion 16, after "group of States" in Mr. Murphy's proposed wording.

Sir Michael Wood (Special Rapporteur) said that the last part of the footnote should then read "at least one other State or group of States concerned (see draft conclusion 16, below)".

Paragraph (5), as amended, was adopted.

The commentary to draft conclusion 5 as a whole, as amended, was adopted.

The meeting rose at 12.55 p.m.